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No. 07-1216

In The Supreme Court of the United States

PHILIP MORRIS USA, INC.,

Petitioner,

v.

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE RETIRED OREGON SUPREME COURT JUSTICES SUSAN M. LEESON, HANS A. LINDE, BETTY ROBERTS, AND RICHARD L. UNIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This brief addresses whether:

1. Oregon's procedural rule that proffered jury instructions must be "correct in all respects" is long-standing and consistently applied; and,

2. the consistent application of that neutral procedural rule in this case provided Philip Morris with due process of law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Posture of This Case Determines Its Proper Disposition	4
II. The Oregon Rule Places the Onus on Parties to Craft Correct Jury Instructions	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Beglau v. Albertus, 536 P.2d 1251 (Or. 1975) 7

Hernandez v. Barbo Machinery Co., 957 P.2d 147 (Or. 1998).....5, 8

Hooning v. Henry, 213 P. 139 (Or. 1923).....8

Hotelling v. Walthe, 148 P.2d 933 (Or. 1944) 8

Oregon v. Campbell, 705 P.2d 694 (Or. 1985) 6

Oregon v. Dameron, 853 P.2d 1285 (Or. 1993).....6

Oregon v. Reyes-Camarena, 7 P.3d 522 (Or. 2000) 8

Owings v. Rose, 497 P.2d 1183 (Or. 1972).....8

Parrott v. Carr Chevrole, 17 P.3d 473 (Or. 2001).....6

Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057 (2007).....*passim*

Schultz v. Shirley, 220 P.2d 86 (Or. 1950).....8

Sorenson v. Kribs, 161 P. 405 (Or. 1916).....7

Stanich v. Buckley, 368 P.2d 618 (Or. 1962) 8

Wiebe v. Seely, Administrator, 335 P.2d 379 (Or. 1959) 8

Williams v. Philip Morris Inc., 127 P.3d 1165 (2006) (*"Williams I"*), *cert. granted,* 547 U.S. 1162 (2006), *judgment vacated,* 549 U.S. 346 (2007).....*passim*

TABLE OF AUTHORITIES

Page

Williams v. Philip Morris Inc., 176 P.3d 1255 (2008) ("*Williams II*"), *cert. granted*, 128 S. Ct. 2094 (2008) ..... *passim*

STATUTES

Or. Rev. Stat. 30.925(2) 9

OTHER AUTHORITIES

Hon. Wallace P. Carson, Jr., *Last Things Last: A Methodological Approach to Legal Argument in State Courts*, 19 Willamette L. Rev. 641 (1983) 6

Hon. Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980) 6

INTEREST OF *AMICI CURIAE*[1]

Petitioner and allied *amici* specifically assert that the Oregon Supreme Court erred in applying state law procedural rules following this Court's remand.

Amici curiae Susan M. Leeson, Hans A. Linde, Betty Roberts and Richard L. Unis ("Oregon Retired Justices") are retired justices who served on the Oregon Supreme Court. Justices Leeson and Roberts also served as judges on the Oregon Court of Appeals, the intermediary appellate court that handles the bulk of Oregon's civil appeals. Justice Unis also served as a trial judge in Multnomah County Circuit Court.

Justices Leeson, Linde and Unis brought academic experience to the Oregon Supreme Court, as well. Justice Leeson served as a professor of political science at Willamette University, and Justice Linde served as a professor of law at the University of Oregon School of Law. Justice Unis taught for decades at

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[1] All parties previously filed written consents with the clerk consenting to the filing of all amicus briefs. Pursuant to United States Supreme Court Rule 37, the parties were given ten days advance notice of this filing. This brief was authored in whole by counsel for the *amici curiae*. No party or its counsel authored the brief in whole or in part. Counsel for *amici* were not paid for their work on this brief. Counsel advanced costs for printing and filing, but will be reimbursed only for their costs by the Oregon Trial Lawyers Association.

Northwestern School of Law at Lewis & Clark College and the Judicial College.

The Oregon Retired Justices have no financial interest in the outcome of this case. However, as judges who have served on the Oregon Supreme Court, as judges who served in Oregon's lower courts, and as academics who have studied and taught about Oregon and federal jurisprudence and procedure, each of the Oregon Retired Justices has extensive experience with state procedural rules.

The Oregon Retired Justices write to explain the Oregon rule regarding jury instructions and to comment on the role of state courts in applying newly-emerging due process requirements. The state law rule is basic and has been applied consistently by all courts in Oregon: a party's proffered jury instruction must be correct in all respects. If it is not, then a trial court does not err when it refuses to give the instruction.

SUMMARY OF ARGUMENT

In remanding this matter to the Oregon Supreme Court, the Supreme Court directed it to provide due process consistent with the new standards announced in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007). On remand, the Oregon court gave Philip Morris the process that was due by applying state law rules that became pertinent on remand. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (2008) ("*Williams II*"), *cert. granted*, 128 S. Ct. 2094 (2008).

Oregon courts adhere to a "first things first" approach, taking on state law issues before considering questions of federal constitutional law. The Oregon Supreme Court followed that method in both of its decisions in this case. In its 2006 decision, the Oregon Supreme Court held that Philip Morris's proffered Instruction No. 34 incorrectly summarized state law, as it related to harm to others. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1176 (2006) ("*Williams I*"), *cert. granted*, 547 U.S. 1162 (2006), *judgment vacated*, 549 U.S. 346 (2007). The Oregon Supreme Court had no need to reach the additional state law defects in Instruction No. 34 until this Court remanded the case for a second review. In 2008, the Oregon Supreme Court again applied the correct-in-all-respects standard on remand, focusing on the additional state substantive law defects in the instruction. *Williams II*, 176 P.3d at 1263.

In its second remand to the Oregon Supreme Court, this Court announced a new feature of due process, holding that punitive damages may not be based on harm to anyone except the plaintiff in the case. *Philip Morris USA*, 127 S. Ct. at 1065. This Court did not construe the Fourteenth Amendment to require trial judges to draft instructions independent of those submitted by the litigants. Nor did this Court otherwise override the familiar state law requirement that a jury instruction must state the law correctly. Oregon courts follow longstanding rules regarding jury instructions. First, parties are responsible for drafting and submitting jury instructions. Second, a

proffered instruction will not be given unless it is correct in all respects. Oregon courts consistently apply these rules in all jury trials.

ARGUMENT

I. The Posture of This Case Determines Its Proper Disposition.

This Court remanded the case to the Oregon Supreme Court to apply a new due process rule for punitive damage cases. As this Court acknowledged, it had not specifically articulated the due process requirement prohibiting punishment for harm to others in punitive damage cases until this case. *Philip Morris USA*, 127 S. Ct. at 1065.

The Oregon Supreme Court initially held that defendant's proposed Instruction No. 34 was "not correct as an independent matter of Oregon Law respecting the conduct of jury trials and instructions that are given to juries." *Williams I*, 127 P.3d at 1176. This was so because Oregon law of punitive damages allowed the jury to consider whether defendants' misconduct harmed others. *Id.* at 1175. The Oregon Supreme Court determined as a matter of federal law that due process did not prohibit this consideration, so long as the conduct causing others' harms was similar to the conduct that harmed the plaintiff. *Id.* at 1176.

The Oregon Supreme Court then applied Oregon's longstanding rule requiring that a proposed jury

instruction must correctly state the law. *Williams I*, 127 P.3d at 1176 ("Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it. *See Hernandez v. Barbo Machinery Co.*, 957 P.2d 147, 152 (Or. 1998) (trial court's refusal to give requested jury instruction 'is not error if the requested instruction is not correct in all respects.')"). Having disposed of the primary issue, the Court had no occasion at that time to address other errors of state substantive law contained in defendant's Instruction No. 34.

As the Oregon Supreme Court explained after this Court's second remand, proffered Instruction No. 34 incorrectly summarized state substantive law in various ways. These errors in state substantive law were based on a state statute that operated independently of the due process standard announced by this Court in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). *Williams II*, 176 P.3d at 1263 ("even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly."). The Oregon Supreme Court measured the remainder of Instruction No. 34 for correctness with Oregon law, found it flawed, and held that the trial court did not err in refusing it. *Id.*

To be sure, the Oregon Supreme Court did not articulate all of the state law flaws with Instruction No. 34 in *Williams I*. When it dealt with only those

state law flaws necessary to dispose of *Williams I*, the Oregon Supreme Court proceeded in its normal fashion. Like many courts, the Oregon Supreme Court prefers to render decisions on narrow grounds, so as to avoid adjudicating issues unnecessarily or prematurely. *See, e.g.*, *Oregon v. Dameron*, 853 P.2d 1285, 1293 (Or. 1993).

Oregon appellate courts adhere to a first-things-first approach, with a strong preference for addressing state law questions before reaching federal questions. *See, e.g.*, *Oregon v. Campbell*, 705 P.2d 694, 703 (Or. 1985) (*citing*, Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980) and Carson, *Last Things Last: A Methodological Approach to Legal Argument in State Courts*, 19 Willamette L. Rev. 641 (1983)).

The Oregon Supreme Court consistently followed that practice here. In its first decision, it rejected defendant's Instruction No. 34 because the instruction incorrectly summarized then-existing state law. *Williams I*, 127 P.3d at 1175, *citing Parrott v. Carr Chevrolet,* 17 P.3d 473, 489 (Or. 2001). The instruction – which combined many components into one lengthy instruction – had additional state-law flaws that ripened for consideration only upon remand.

This Court's subsequent announcement of a new due process element for punitive damages cases does not appear to require state courts to jettison state law procedures. A litigant is still not entitled to a jury charge that incorrectly instructs on state law. Due

process does not permit or require state appellate courts to reverse a trial court for failing to give an instruction that was erroneous on several points of state law.

To hold otherwise represents a marked departure from the established relationship between the state and federal courts. Such a decision – by implication – would mandate that state courts dispose of all possible state law issues in all cases with potential federal questions. That outcome would tell state courts that they may not decide disputes on the narrowest grounds presented, even if that is how the state court chooses to adjudicate cases.

II. The Oregon Rule Places the Onus on Parties to Craft Correct Jury Instructions.

Philip Morris argues that the rule requiring clear instructions creates a new and impermissible barrier to its assertion of federal due process rights. Philip Morris Brief on the Merits, pp. 23-24. To the contrary, the requirement is long-standing and consistently applied. Parties in civil cases are entitled to jury instructions on their respective theories of the case, so long as the instructions are supported by the evidence and correctly drawn. *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975).

The rule – which was the product of studied consideration by the Oregon Supreme Court – dates back almost a century. *Sorenson v. Kribs*, 161 P. 405, 410 (Or. 1916). It has been applied and restated

through the ensuing years. *Hotelling v. Walther*, 148 P.2d 933, 936 (Or. 1944) (onus of drafting clear and correct instructions falls on the parties; trial judges are not clairvoyants); *Wiebe v. Seely, Administrator*, 335 P.2d 379, 393 (Or. 1959) (trial courts properly refuse requested jury instructions if they are not correct in all aspects); *Stanich v. Buckley*, 368 P.2d 618, 622 (Or. 1962) (proper to refuse to give instruction that did not correctly state the law); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) (trial court is not obligated to pick out correct passages of proposed instructions, while deleting those passages that are incorrect). *Hernandez*, 957 P.2d at 151 (Or. 1998) (requested instructions given only if they accurately state the applicable legal standards).

The Oregon Supreme Court consistently applies the rule in civil litigation. The rule has worked against plaintiffs and against defendants in civil litigation. *Compare, e.g.*, *Schultz v. Shirley*, 220 P.2d 86, 88 (Or. 1950) (affirming civil judgment in favor of defendant because part of plaintiff's proposed multi-part instruction inaccurately summarized the law) *with, e.g.*, *Hooning v. Henry*, 213 P. 139, 140 (Or. 1923) (affirming judgment in favor of plaintiff because defendant failed to submit a correct instruction).

The Oregon Supreme Court has applied the same rule in death penalty cases. *Oregon v. Reyes-Camarena*, 7 P.3d 522, 528 (Or. 2000) ("Because defendant's requested sympathy instruction, considered in its entirety, did not state the law correctly in

all respects, the trial court did not err in refusing to give that sympathy instruction regardless of whether the instruction was correct in part.") Even when the stakes are literally life and death, the court applies the same rule.

Against this standard, the errors in the proffered instruction determine the outcome. As the Oregon Supreme Court explained on the second remand, Philip Morris assigned error to the failure to give its proffered Instruction No. 34. *Williams II*, 176 P.3d at 1260. The proffered instruction erroneously summarized state substantive law in multiple respects. *Williams II*, 176 P.3d at 1261-63.

The errors in the instruction related to state substantive product liability standards set forth by the Legislative Assembly. Or. Rev. Stat. 30.925(2). These statutory standards on punitive damages control jury discretion in assessing punitive damages. The proposed instruction simply ignored or overwrote provisions of the statute.

For example, Philip Morris's Instruction No. 34 altered the statutory scheme by making permissive that which the Legislative Assembly concluded was mandatory. *Williams II*, 176 P.3d at 1262-63. As well, the proposed instruction misstated one of the operative considerations Oregon juries give to the assessment of punitive damage claims. *Williams II*, 176 P.3d at 1263.

The errors in the instruction had no connection with the due process issue of punishing for harm to

others. The Oregon Supreme Court did not demand prescience on the part of Philip Morris. That is to say, the Oregon Supreme Court did not fault the defendant because it failed to offer an instruction that correctly predicted the future course of this Court's due process jurisprudence. Rather, the Oregon Supreme Court reviewed defendant's demand for a new trial on an instruction that incorrectly summarized state statutory standards, and denied that relief. So long as defendant had the opportunity to make its arguments and present its best instruction, there was no due process flaw when the Oregon court asked whether the instruction correctly stated Oregon law in all respects. In the end, this Court decided a due process issue and remanded the matter to the Oregon Supreme Court. The Oregon Supreme Court reviewed this Court's disposition and then applied the same due process standards available to every litigant in the State. And using those same standards, the Oregon Supreme Court found that there was no error because Philip Morris's proffered jury instruction failed correctly to state the law. Unless this Court is now prepared to declare that due process requirements invalidate a neutral state law rule of trial procedure, the Oregon Supreme Court did not err.

CONCLUSION

The Oregon Retired Justices *amici* have no stake in the outcome, save for an institutional concern over unfounded criticism leveled at the Oregon Supreme

Court. In applying the well-established state law rule, the Oregon Supreme Court did not defy this Court. Neither did it engage in some trickery or sleight of hand. Instead, the Oregon Supreme Court provided to Philip Morris the full panoply of due process protections when it required Philip Morris to comply with the longstanding rule regarding jury instructions.

Respectfully submitted,

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